Supreme Court, U.S.
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No. 89-1848

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

CLAUDE LEWIS THOMAN,

Petitioner,

v.

CONCEPT, INC.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

COUNTER STATEMENT OF THE QUESTIONS PRESENTED

Concept disagrees with the question presented in Thoman's Petition because it is clear that a civil rights claim can be knowingly and voluntarily waived. In cases where this issue is submitted to a jury after a full trial on the merits, as it was in Thoman's case, a single question is presented, *viz:*

Whether the jury charge as a whole, in connection with the contentions made by the parties and the evidence presented at trial, in general, correctly instructed the jury.

PARTIES TO THE PROCEEDING

Effective June 30, 1990, Concept's parent company, provided all necessary approvals are obtained and all legal filings are made, will be Bristol-Myers Squibb Company.

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STATEMENT OF THE CASE

Concept would add the following facts omitted from Thoman's Statement of the Case.

The Fifth Circuit, in Thoman II, found that Thoman was a man with a college education and experience with insurance and sales contracts (Petitioner's Brief, Appendix A, p.9-A). For several months prior to his resignation, Thoman had been aware that his job was in jeopardy because his supervisor, Robert Jackson, often criticized his performance. (Petitioner's Brief, Appendix A, p.3-A).

When presented with the release and asked to resign, Thoman read it and told Jackson he had no objection to waiving workers' compensation claims, but suspected that Concept was really terminating him because of his age (Petitioner's Brief, Appendix A, p.3-A) and wondered if that was legal. He signed the release anyway to get the $9,000. (Petitioner's Brief, Appendix A, p.4-A).

On appeal Thoman argued that the Court's instruction on waiver misled the jury. But the Court did not agree. It held that the Trial Judge's instruction that Thoman could act "Knowingly . . . even if he was mistaken about the effect of the release or failed to read the release" was harmless error because "Thoman admitted . . . he read the release, and his statements regarding workers' compensation . . . [indicated] . . . that he realized . . . the release waived at least one type of legal claim" so the erroneous charge "could not have misled the jury or resulted in any prejudice to Thoman." (Petitioner's Brief, Appendix A, p.7-A). It also ruled that the instruction on the standard for voluntariness was a correct statement of the law (Petitioner's Brief, Appendix A, p.7-A) and that Thoman was not entitled to an enumeration of the six factors referenced in Thoman I because "waivers are evaluated under a totality of circumstances test, with no one factor being dispositive." (Petitioner's Brief, Appendix A, p.8-A). Thus, the Appeals

Court held the charge, as a whole, adequately stated the law regarding waiver and the jury properly concluded Thoman was able to understand the release (Petitioner's Brief, Appendix A, p.9-A).

REASONS FOR NOT GRANTING THE WRIT

This is not a case of national importance that would require guidance by this Court. It doesn't present a novel question because an educated employee, like Thoman, can waive a discrimination claim, and the legal standard for such a waiver is whether or not the employee knowingly and voluntarily waived his claim. This question is determined by applying a totality of circumstances test.

There is no split of authority on applying the totality of circumstances test. All of the circuits apply it, they just refer to it by different names. Some circuits call it the totality of circumstances test, while others refer to it as a test of ordinary contract principles. But a careful review of each case shows that a civil rights waiver will not be inferred by a court based solely on the employee's signature on a release. All courts go beyond the signature to determine whether or not the employee actually knew what he was doing and did it voluntarily. There is no need for Supreme Court guidance because all circuits are in agreement on this point and the Trial Court instructed the jury to use this test.

I. THE STANDARD TO BE APPLIED IN DETERMINING THE VALIDITY OF A CIVIL RIGHTS WAIVER IS WHETHER OR NOT THE EMPLOYEE'S CONSENT TO THE WAIVER WAS KNOWING AND VOLUNTARY.

The Supreme Court has already stated the effectiveness of a civil rights waiver is determined by whether or not the employee's consent to the waiver was knowing and voluntary. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974). In the more stringent constitutional setting, the question is whether it was "the product of an essentially free and unconstrained choice by its maker," *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) and was it a "voluntary . . . knowing, intelligent act done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970). Therefore, if Thoman knowingly and voluntarily signed Concept's waiver, he forfeited his age-based discrimination claim.

II. THERE IS NO CONFLICT AMONGST THE CIRCUITS REGARDING THE TEST USED TO DETERMINE WHETHER A CIVIL RIGHTS WAIVER WAS KNOWING AND VOLUNTARY, THEY WEIGH THE TOTALITY OF CIRCUMSTANCES TO DETERMINE WHETHER THE EMPLOYEE KNOWINGLY AND VOLUNTARILY WAIVED THE CLAIM.

Thoman concedes that the Second and Third Circuits apply the totality of circumstances standard, but claims the Sixth and Eighth Circuit use a harsher ordinary contract principle standard and that the Fifth Circuit is somewhere in between. (Petitioner's

Brief, Appendix A, pp.6, 7, & 8). This is simply not so. All of the circuits use the totality of circumstance test, regardless of the name by which it is called.

Even though the Sixth and Eighth Circuits refer to an ordinary contract principle test, it's clear they consider all of the circumstances surrounding the waiver. In *Lancaster v. Buerkle Buick Honda*, 809 F.2d 539 (8th Cir.) *cert. denied*, 482 U.S. 928 (1987) the court addressed all of the facts attendant to the waiver including the length of time the employee was given to sign the agreement, his decision not to seek legal counsel, the fact he read the agreement and weighed its terms before signing it, the length of the document, the clear, simple, unambiguous language used, and the fact that the employee was in management and had signed numerous contracts in his lifetime. *Id.* at 541. Likewise, in *Runyan v. National Cash Register Corp.*, 787 F.2d 1039 (6th Cir.) *cert. denied*, 479 U.S. 850 (1986) the court relied on the fact that the plaintiff was a well-paid, well-educated labor attorney with many years of experience who knowingly and deliberately executed the waiver. *See also Shaheen v. B.F. Goodrich*, 873 F.2d 105 (6th Cir. 1989) where the court considered the length of time the employee had the release, the fact she consulted an attorney, did not claim fraud, duress or mutual mistake, and presented no evidence to show her actions were less than voluntary. Likewise, *Coventry v. U.S. Steel Corp.*, 856 F.2d 514, 522, 533 (3rd Cir. 1988) where the court said to determine the validity of the release, "a review of the totality of circumstances, considerate of the particular individual who has executed the release, is also necessary." The Fifth Circuit is in accord, *see O'Hare v. Global Natural Resources, Inc.*, 898 F.2d 1015 (5th Cir. 1990) where the court said that the "totality of circumstances" approach is appropriate to determine whether or not a civil rights waiver is knowing and voluntary.

Thoman's reliance on the Appellate Court's decision in Thoman I is misplaced because the question on appeal was

whether there was a material question of fact that Thoman had knowingly and voluntarily waived his age claim. The Court held that there was and reversed the Trial Court's Summary Judgment. This question was given to the jury in Thoman II, under the proper test, and it concluded he did indeed know what he was doing.

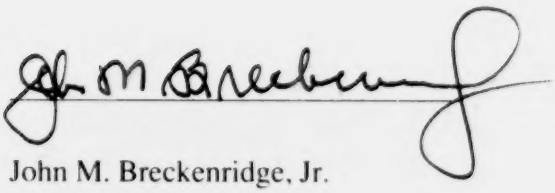
III. THE JURY CHARGE, IN GENERAL, CORRECTLY INSTRUCTED THE JURY.

The Appeals Court held that the jury was properly instructed to consider all the circumstances (the totality test) and decide if Thoman knowingly and voluntarily waived his discrimination claim (Petitioner's Brief, Appendix A, p. 9-A). It correctly refused to consider isolated statements, as urged by Thoman on appeal, *see Seaboard Airline Railway v. Padgett*, 236 U.S. 668, 672 (1915), where this Court held, "Whether the instructions could have produced misconception in the minds of the jury is not to be ascertained by merely considering isolated statements, but by taking into view all the instructions given and the tendencies of the proof in the case. . . ."

CONCLUSION

Since the knowing and voluntary standard is well-settled, all the circuits apply the totality of circumstances test, and the Trial Court correctly instructed the jury to use this test, there is no need for Supreme Court guidance on any issue in this case. Therefore, Concept respectfully requests that this Court deny Thoman's Petition for Writ of Certiorari.

Respectfully submitted,



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